a civilian informant invitee.[13] The Ninth Circuit has adopted the doctrine as applied to police officers.[14] The Sixth Circuit adopted the doctrine as applied to police officers in *United States v. Pollard*,[15] and extended its rule to include civilian informants in the instant case.

B. This Court's Fourth Amendment jurisprudence prohibits the expansion of the doctrine of "consent once removed" to civilian informants.

Yoon asserts that the doctrine of "consent once removed," while perhaps not invalid as applied to police officers, runs afoul of the Fourth Amendment as applied to civilian informants. For the reasons explained below, the distinction between civilian informants and police officers is critical in determining the validity of the doctrine, and the various theories that have been advanced by the courts of appeals to support extending the doctrine to civilian informants cannot be reconciled with this Court's Fourth Amendment jurisprudence.

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cert. denied, *Diaz v. U.S.*, 484 U.S. 857, 108 S. Ct. 166, 98 L. Ed. 2d 120 (1987).

[13] *United States v. Jachimko*, 19 F.3d 296 (7th Cir. 1994) (remanding to district court to consider whether doctrine of consent once removed applied); *United States v. Akinsanya*, 53 F.3d 852 (7th Cir. 1995).

[14] *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1997) (adopting doctrine to permit warrantless entry into defendant's home of additional officers following consensual entry by undercover officers who observed contraband therein, then identified themselves and called for backup).

[15] 215 F.3d 643 (6th Cir. 2000), *cert. denied*, *Pollard v. U.S.*, 531 U.S. 999, 121 S. Ct. 498, 148 L. Ed. 2d 469 (2000) (holding that warrantless entry of back-up officers was legal following consensual entry of undercover officers).

1. Extending the doctrine to civilian informants improperly gives police powers to civilians.

As explained in part A, above, the basis for the doctrine of "consent once removed" seems to have derived from two established rules: (1) the plain-view doctrine, which permits an officer to seize contraband in plain view without a warrant; and (2) the collective knowledge doctrine, which permits courts to impute knowledge among a officers conducting an investigation. It arguably follows from these rules that an undercover officer who enters a dwelling with consent and observes contraband may seize the contraband and that back-up officers may enter to assist in the arrest. But these privileges are unique to police officers. Therefore, extending the doctrine of "consent once removed" to cases in which the invitee is a civilian informant has no basis in law.

To the extent that the doctrine is rationalized upon the right of police to make a "plain-view" seizure of contraband, such powers have never been granted to civilians. Under the plain-view doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant.[16] This is a power granted to law enforcement officers only; civilians are not permitted to seize drugs.

Likewise, the authority of law enforcement officers to rely upon information regarding probable cause received

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[16] *See Horton v. California*, 496 U.S. 128, 136-137, 110 S. Ct. 2301, 2307-2308, 110 L. Ed. 2d 112 (1990); *Texas v. Brown*, 460 U.S. 730, 739, 103 S. Ct. 1535, 1541-1542, 75 L. Ed. 2d 502 (1983) (plurality opinion).

from other law enforcement officers working together is a privilege unique to law enforcement officers. Where officers work together on an investigation, courts have recognized the so-called "collective knowledge" theory to impute the knowledge of one officer to other officers to uphold an otherwise invalid search or seizure.[17] Under this rationale, the validity of a search "may be based on the collective knowledge of all of the law enforcement officers involved in an investigation if . . . some degree of communication exists between them."[18] The concept that a team of investigating officers can be treated as a single entity by the courts for certain Fourth Amendment purposes makes it at least conceptually plausible that consent given to an undercover officer can extend to additional officers. Similarly, it could be argued that if law enforcement officer teams are treated as a single entity, no additional privacy interests are implicated when the undercover officer calls in additional officers to assist in the arrest.

Like the plain-view doctrine, however, the theory of collective knowledge has never been extended to civilian informants working with law enforcement officers, and for good reason: law enforcement officers are trained in making determinations of probable cause; civilian informants are not. Thus, while the law perhaps permits an undercover officer to summon other officers to assist in an in-home arrest based upon of finding of probable cause by

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[17] *See, e.g., United States v. Hensley*, 469 U.S. 221, 232, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985); *United States v. Chhunn*, 11 F.3d 107, 110 (8th Cir. 1993); *United States v. Calandrella*, 605 F.2d 236, 246 (6th Cir. 1979); *United States v. Butler*, 74 F.3d 916, 921 (9th Cir. 1996); *United States v. Paradis*, 802 F.2d 553, 557 (1st Cir. 1986).

[18] *United States v. Gonzales*, 220 F.3d 922, 925 (8th Cir. 2000).

the undercover officer, there is no basis for extending the same authority to a civilian informant. Where an informant's report forms the basis of probable cause, the need for a neutral magistrate to determine the credibility of the report and make the assessment of probable cause is more compelling.

Moreover, entrusting police powers to civilian informants is particularly inappropriate because informants are a suspect class of civilians. As concisely stated by the dissent in the instant case:[19]

> [I]nformants ... often have criminal charges pending and therefore have every reason to curry favor with the police in the hope of receiving lenient treatment for their own wrongdoing. Thus, by not recognizing the conceptual basis for the consent-once-removed doctrine, the majority effectively deputizes the very criminals from whom law enforcement officials should be protecting law-abiding citizens.

The risks of entrusting informants with police powers in this fashion are amply demonstrated in the instant case. Because the informant was merely a cooperating criminal who had been arrested just earlier the same day, his credibility was certainly not established. Nevertheless, the law enforcement officers relied upon him in delivering the bust signal that would trigger a warrantless police raid. Moreover, the bust signal was not predetermined; instead Kim was to indicate in a subtle fashion when he saw the marijuana. Ultimately, an ambiguous comment about "breaking 'it' down," was relied upon by the police to

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[19] Op. at App. 22 (dissent).

establish probable cause that there was contraband in the apartment.

While the doctrine of "consent once removed" may be plausibly derived from privileges unique to police officers, the logical leap required to expand the rule to include civilian informants has no such basis in law. Moreover, because criminal informants are an especially untrustworthy class of citizens, it is plainly erroneous to suggest, as the Seventh Circuit has, that there is only an "incremental" difference between a civilian informant and a police officer, one that is "too slight to bring the requirement of a warrant into play."[20]

2. The rationale that a suspect's privacy interests are "fatally compromised" by displaying contraband to an informant so as to obviate the need for a warrant is contrary to long-standing Fourth Amendment jurisprudence.

This rationale has been repeatedly advanced by the Seventh Circuit to support the doctrine of consent once removed.[21] If it were the case, however, that by having illegal dealings in private with an informant a suspect waives his rights under the Fourth Amendment, long-standing rules dictated by this Court regarding obtaining warrants would be rendered obsolete. For example, in *Illinois v. Gates*,[22] this Court abandoned a rigid two-pronged test for the issuance of a warrant and substituted

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[20] *See* note 10, *supra*.

[21] *See, e.g., United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986); *United States v. Jachimko*, 19 F.3d 296, 299 (7th Cir. 1994).

[22] 462 U.S. 213, 234, 103 S. Ct. 2317, 2330, 76 L. Ed. 2d 527 (1983).

in its place a "totality of the circumstances" approach for determining whether an informant's report suffices to establish probable cause for issuance of a warrant. Accordingly, a court must look to the "totality of the circumstances," including a confidential informant's veracity, reliability, and basis of knowledge, in order to answer "the commonsense, practical question" of whether an affidavit is sufficient to support a finding of probable cause.[23] One of the reasons stated by the Court for creating a less rigid test was to encourage officers to seek warrants, rather than "resort[ing] to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search."[24]

But if a suspect's privacy interests have been "fatally compromised" by the act of displaying illegal activities or contraband to an informant, none of these rules concerning the requisites of a warrant application would be necessary – the police could simply enter without a warrant. Clearly, the Court could not have entertained the notion that the act of conducting private illegal dealings with an informant effectively waives all Fourth Amendment rights when it formulated these rules. Moreover, if such a warrant exception exists, additional questions arise. For example, is there a time limit on the loss of privacy interests, i.e., does the informant's report become "stale" after some period of time? Does the loss of privacy interests attach where the informant is unnamed? Is any corroboration required? These considerations have been

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[23] *Id.*, 462 U.S. 213, 230, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (quotation marks omitted).

[24] *Id.*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331, 76 L. Ed. 2d 527 (1983).

ignored by courts in advancing this rationale for "consent once removed."

This Court has long held that a warrantless search by the police is violates the Fourth Amendment unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement.[25] The Fourth Amendment draws a firm line at the entry to one's house such that a police officer may not, in the absence of exigent circumstances or consent, enter a house to arrest or search without a warrant.[26] This Court has tolerated departures from the warrant requirement only when an exigency makes a warrantless search imperative to the safety of the police and of the community.[27] Invitations to carve out further exceptions to the warrant requirement for searches of the home have been "steadfastly rejected" by the Court because the Fourth Amendment compels that "the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law."[28] In light of these cases, the assertion that conducting private illegal transactions with an informant or displaying contraband to informant in private creates an exception to the warrant requirement is unfounded.

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[25] *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

[26] *See Payton v. New York*, 445 U.S. 573, 585-589, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

[27] *Illinois v. Rodriguez*, 497 U.S. 177, 191-192, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990).

[28] *Id.* at 192.

3. An exception to the warrant requirement does not arise from the informant's right to make a citizen's arrest.

Another rationale advanced by the majority in the instant case to support "consent once removed" as applied to a civilian informant is that if a private citizen has authority to make a citizen's arrest under state law, the citizen should be entitled to summon police officer's to assist in the arrest.[29] This theory, however, ignores the fact that the Fourth Amendment is designed to protect against unreasonable searches and seizures by state actors rather than private citizens.[30] "A warrantless search by the *police* is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement."[31] Accordingly, the theory that a private citizen making a valid citizen's arrest in a residence can invite police inside to assist without implicating the Fourth Amendment is flawed.

4. Excusing the lack of a warrant in this case serves no other purpose than the convenience of the officers.

As noted in the dissenting opinion, this Court has held that "the inconvenience to the officers and . . . slight delay

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[29] Op. at 807, n. 2.

[30] *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528, 87 S. Ct. 1727, 1730, 18 L. Ed. 2d 930 (1967). *See also Delaware v. Prouse*, 440 U.S. 648, 653-654, 99 S. Ct. 1391, 1395-1396, 59 L. Ed. 2d 660 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S. Ct. 3074, 3081, 49 L. Ed. 2d 1116 (1976).

[31] *Flippo v. West Virginia*, 528 U.S. 11, 14, 120 S. Ct. 7, 8, 145 L. Ed. 2d 16 (1999).

necessary to prepare papers and present evidence to a magistrate" is not a sufficient reason to abrogate the warrant requirement.[32] There was no reason but convenience for failing to obtain a warrant in the instant case.

The only exigent circumstances in the instant case were created by the government. The law enforcement officers conducting the investigation chose to send the cooperating co-defendant into the apartment without providing him enough cash to complete the transaction; in fact, the decision to conduct the investigation without the full amount of cash was due to the officers' unwillingness to wait a day or two when they could obtain the full amount.

Law enforcement officers cannot manufacture exigent circumstances in lieu of obtaining a warrant. "[P]olice officials . . . are not free to create exigent circumstances to justify their warrantless intrusions."[33] The government cannot rely on exigent circumstances that it creates by having government agents approach a residence.[34] Likewise, the government certainly cannot send an informant into what it considers a dangerous situation then claim that exigent circumstances justified a raid.

To the extent that the "consent once removed" doctrine sanctions the failure to obtain a warrant purely on the

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[32] *Johnson v. United States*, 333 U.S. 10, 15, 69 S. Ct. 367, 92 L. Ed. 436 (1948); Op. at 813 (dissent.)

[33] *United States v. Williams*, 54 F.3d 497, 504 (6th Cir. 2003) (quoting *United States v. Morgan*, 743 F.2d 1158, 1163 (6th Cir. 1984)).

[34] *United States v. Buchanan*, 904 F.2d 349, 355 (6th Cir. 1990); *United States v. Hare*, 589 F.2d 1291, 1294 (6th Cir. 1979).

grounds police officer convenience, it is contrary to this Court's Fourth Amendment jurisprudence.

CONCLUSION

The doctrine of "consent once removed" carves out a significant new exception to the warrant requirement. While there may be some basis in law for applying the doctrine in cases where the invitee is an undercover officer in light of certain privileges given to law enforcement officers, no such justification exists for applying the doctrine to civilian informants. While the courts have advanced a variety of theories to support extension of the doctrine to civilian informants, not one of them can stand up to scrutiny under this Court's Fourth Amendment jurisprudence.

Accordingly, this Court should grant certiorari to review the question of whether the doctrine of "consent once removed" violates the Fourth Amendment.

Respectfully submitted,

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APPENDIX A
OPINION OF THE COURT OF APPEALS

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 05a0092p.06

UNITED STATES COURTS OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* MIN YOON, *Defendant-Appellant.*	No. 03-5875

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 02-00101 – Todd J. Campbell, District Judge.

Argued: October 29, 2004

Decided and Filed: February 24, 2005.

Before: KENNEDY and GILMAN, Circuit Judges;
HOOD, District Judge.*

COUNSEL

ARGUED: Norman J. Silverman, Houston, Texas, for Appellant. Van S. Vincent, ASSISTANT UNITED STATES ATTORNEY, Nashville, Tennessee, for Appellee. **ON BRIEF:** Norman J. Silverman, Houston, Texas, for Appellant. Van S.

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* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Vincent, William Cohen, ASSISTANT UNITED STATES ATTORNEY, Nashville, Tennessee, for Appellee.

HOOD, D. J., delivered the opinion of the court. KENNEDY, J. (pp. 7-9), delivered a separate concurring opinion. GILMAN, J. (pp. 10-13), delivered a separate dissenting opinion.

OPINION

HOOD, District Judge. In June of 2002, law enforcement officers staked out Min Yoon's apartment and observed an informant, whom they had equipped with a wire, enter. When the police heard the informant asking Yoon about quantities of marijuana and the logistics of shipping it, they forcibly entered the apartment. After finding marijuana on the premises, the police arrested Yoon. Yoon moved to suppress the evidence found in the apartment because it was obtained without a warrant. The district court denied his motion. He subsequently entered a conditional guilty plea relating to the distribution of marijuana.

On appeal, Yoon alleges that the district court erred in denying his motion to suppress the evidence obtained without a warrant. He further alleges that the district court's assessment of a two-point sentencing enhancement for obstruction of justice was clearly erroneous, both under the United States Sentencing Guidelines and under the new precedent of *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004). For the reasons stated below, we **AFFIRM** the judgment of the district court.

I. FACTUAL AND PROCEDURAL HISTORY

A. Factual background

1. Suppression Issue

Following his arrest in June of 2002 for a drug deal, Meen W. Kim agreed to act as an informant for the Tennessee Bureau of Investigation (TBI). As part of this arrangement, Kim immediately set up a marijuana transaction with Yoon. Kim spoke with Yoon by phone, which resulted in Yoon's inviting him to an apartment at 2010 Brentridge Circle, in Nashville, Tennessee. The police provided Kim with an audio transmitter and instructed him to subtly indicate when he saw the marijuana. Although Kim was provided with a bundle of cash, it was significantly less than the amount that would have been required to complete the transaction. This caused one of the TBI officers conducting the raid to be concerned for Kim's safety.

Once Yoon admitted Kim into the apartment, and Kim observed the marijuana, Kim notified the officers of his observation by questioning Yoon, asking "[h]ey, are you having to break it down?" Yoon provided an affirmative response. Kim then asked Yoon, "[w]ell, is that all there is?" to which Yoon replied "[n]o, no, there's more." Upon hearing this exchange, the police entered the apartment. The officers arrested Yoon as he tried to flee by climbing out a window.

Subsequent to his apprehension, and having been advised of his Miranda warnings, Yoon was asked for consent to search the apartment. Appellant answered, "Go ahead, you're already here." The eighty pounds of marijuana seized in the apartment, however, were observed in plain view as the officers conducted a protective sweep.

2. Sentencing Issues

While on release pending sentencing, Yoon posted an anonymous webpage on www.asianavenue.com featuring a photograph of Kim, who was now his co-defendant. The words "FBI Informant" appeared below the photograph, and an image of a gun was displayed next the photo, firing in the direction of Kim's head. Additional text announced that Yoon hoped Kim would "get . . . [his] ass beat daily like [he] did last time there in Mississippi," and gave a blunt summation of Yoon's sentiments: "Fuck Joe Kim for snitching on me." When he was informed that the website might be illegal, Yoon removed it.

B. Procedural background

1. Suppression Issue

Yoon moved to suppress the evidence obtained from the apartment, alleging a violation of his Fourth Amendment right to be free from unreasonable searches and further claiming that the search "was so outrageous as to violate his Fifth Amendment right to due process of law." The district court denied Yoon's motion. Yoon then pled guilty to conspiracy with the intent to distribute 50 or more kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846. In the plea agreement, however, Yoon specifically reserved "the right to appeal the determination of the appropriateness of the entry and search of 2010 Brentridge Circle, Nashville, TN."

2. Sentencing Issues

Yoon's Presentence Report noted that he had posted a webpage threatening Kim, which led to a recommendation

of a two-point adjustment for obstruction of justice. No jury found Yoon guilty of threatening Kim, and Yoon did not plead guilty to this offense, although he did admit to the webpage posting at his sentencing hearing. Over Yoon's objection, the district court followed the report's recommendation, explaining its decision as follows:

> In terms of the reasons for the sentence, in a nutshell, Mr. Yoon, you show no evidence of remorse. Your conduct while on release pending sentencing is outrageous. What you posted on the website, materially, objectively and subjectively threatened a witness and a co-defendant and deserves the top of the range punishment, which the court is imposing.

This timely appeal followed.

II. STANDARD OF REVIEW

Factual findings supporting a district court's ruling on a motion to suppress are upheld unless clearly erroneous, but "[t]he court's final determination as to the reasonableness of the search is a question of law reviewed de novo." *United States v. Galloway,* 316 F.3d 624, 628 (6th Cir. 2003) (upholding the district court's denial of a motion to suppress evidence that was found during a customs inspection). Where the district court has denied the motion to suppress, "the appellate court must consider the evidence in the light most favorable to the government." *United States v. Erwin,* 155 F.3d 818, 822 (6th Cir. 1998) (en banc decision upholding the district court's denial of a motion to suppress evidence that was found during a search of the defendant's vehicle).

A similar standard applies to the district court's enhancement of Yoon's sentence under the Sentencing Guidelines for obstruction of justice. The factual findings underlying the district court's decision will be reversed only if clearly erroneous, but the legal interpretation of the Guidelines is reviewed de novo. *United States v. Burke,* 345 F.3d 416, 428 (6th Cir. 2003) (upholding a sentencing enhancement for obstruction of justice).

III. DISCUSSION

A. Yoon's Motion to Suppress

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "[A] search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'" *Coolidge v. New Hampshire,* 403 U.S. 443, 474 (1971) (holding that a warrant issued by the state Attorney General who prosecuted the defendant was invalid). *See also Illinois v. Rodriguez,* 497 U.S. 177, 192 (1990) ("The Court has often heard, and steadfastly rejected, the invitation to carve out further exceptions to the warrant requirement for searches of the home. . . . ").

The exception claimed by the government in this case is the doctrine of "consent once removed," accepted by the Sixth Circuit in *United States v. Pollard,* 215 F.3d 643 (6th Cir. 2000). According to *Pollard,* the police can enter a suspect's premises to arrest the suspect without a warrant if

> [an] undercover agent or informant: 1) entered at the express invitation of someone with authority to consent; 2) at that point established the existence of probable cause to effectuate an arrest or search[1]; and 3) immediately summoned help from other officers.

Pollard, 215 F.3d at 648, *quoting United States v. Akinsanya,* 53 F.3d 852, 856 (7th Cir. 1995) (holding that consent given to a government informant, unaccompanied by a police officer, was sufficient to authorize the search) (quotation marks omitted). The *Pollard* court, noting that the Sixth Circuit had declined to rule on this issue in *United States v. Ogbuh,* 982 F.2d 1000 (6th Cir. 1993), adopted the doctrine of "consent once removed," *Pollard,* 215 F.3d at 649, and upheld the constitutionality of the search at issue.

Unlike in *Akinsanya* and the present case, however, the search in *Pollard* was conducted after the defendant invited both an informant and an undercover police officer onto the premises. *See Pollard,* 215 F.3d at 646 ("The

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[1] This doctrine does not permit the officers who enter a suspect's home to conduct a general search of the home. Rather, it provides that once an undercover agent or informant establishes probable cause to arrest or to search (i.e., probable cause to obtain a search warrant) then the undercover officer or informant in the suspect's home may summon other officers to assist in effectuating the *arrest.* As the doctrine is based upon consent to enter one's home (and not consent to search), the area in the suspect's home that the officers are entitled to be in is limited by the scope of the consent originally given to the undercover officer or informant. *United States v. Bramble,* 103 F.3d 1475, 1478 (9th Cir. 1996). The officers may of course seize anything in plain view and are entitled to conduct a protective sweep, but they may not conduct a general search without "first satisfying the ordinary requirements of consent, a warrant, or exigent circumstances which excuse the failure to obtain a warrant." *Id.* at 1478-79.

informant and Detective . . . Askew, who was acting undercover, approached the house and knocked on the door . . . [and] Pollard admitted them."). The issue faced by the *Pollard* court, therefore, was not whether the doctrine of "consent once removed" applies where consent is given to a civilian informant only, but whether the doctrine applies where consent is given to an undercover police officer and the informant at the same time. For this reason, the *Pollard* courts specific statement that the doctrine applies when "an officer *or informant* (emphasis added) . . . enters at the express invitation of someone with authority to consent," (*Pollard,* 215 F.3d at 648) (emphasis added), was dicta, rather than part of the holding. *See Billeke-Tolosa v. Ashcroft,* 385 F.3d 708, 712 (6th Cir. 2004) ("Dicta . . . is language that is only incidental to th[e] holding.").

"The prior decision [of a Sixth Circuit panel] remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *Darrah v. City of Oak Park,* 255 F.3d 301, 309 (6th Cir. 2001) (discussing the effect of published opinions by previous panels). *See also* 6th Cir. R. 206(c) (cited in *Darrah*; noting that "[r]eported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. . . . "). This rule, however, "does not extend to dicta." *United States v. Jenkins,* 4 F.3d 1338, 1345 n.8 (6th Cir. 1993) (distinguishing a previous Sixth Circuit panel's dicta from its holding). The question of whether the doctrine of "consent once removed" applies where only a civilian informant receives consent, therefore, has not yet been decided by the Sixth Circuit despite the broad language in *Pollard.*

In order to determine whether the warrantless entry into Yoon's apartment by law enforcement officers violated the Fourth Amendment, the Court must ascertain whether the doctrine of "consent once removed" applies when the recipient of the consent is an informant unaccompanied by an undercover officer. Although this is an issue of first impression in the Sixth Circuit, several similar Seventh Circuit cases provide helpful guidance.

In *United States v. Paul,* 808 F.2d 645 (7th Cir. 1986), the Seventh Circuit slightly extended the doctrine of "consent once removed." *Paul* was similar to Seventh Circuit cases in which the doctrine had traditionally been applied except, instead of an undercover officer being granted consent to enter, consent was extended only to a confidential informant. In *Paul,* the confidential informant had arranged to buy a bale of marijuana from the defendant. The agents involved outfitted the confidential informant with an alert button and instructed him to press it once he observed the marijuana. Once pressed, the alert button summoned agents waiting outside the home. The *Paul* Court held that, because Paul's privacy interests had already been compromised, and because if the informant had happened to be an agent he would have been entitled to summon more agents after viewing the drugs, the principle espoused in other "consent once removed" cases "extends to the case where the initial consensual entry is by a confidential informant." *Paul,* 808 F.2d at 648. The Seventh Circuit has followed the same reasoning in two subsequent cases. *See United States v. Jachimko,* 19 F.3d 296 (7th Cir. 1994); *United States v. Akinsanya,* 53 F.3d 852 (7th Cir. 1995); see also *United States v. Bramble,* 103 F.3d 1475, 1478-79 (9th Cir. 1996). This Court agrees

with and adopts the sound reasoning of the Seventh Circuit in *Paul, Jachimko,* and *Akinsanya.*

In the case *sub judice,* Kim, acting as an informant for law enforcement, carried out a series of monitored conversations with Yoon. These monitored telephone conversations concluded in an agreement to purchase 20 pounds of marijuana. The exchange was to take place at Yoon's apartment. On the night of the exchange, Kim was invited into the residence by Yoon. Clearly, Yoon had the authority to consent to another being on the premises. Once inside the apartment, Kim observed the marijuana and immediately notified awaiting officers as to its presence via an audio transmitter. Notification that marijuana was in the residence established the necessary probable cause to effectuate an arrest.[2] Accordingly, all three criteria of the "consent once removed" doctrine were established in the present case.

In *Pollard,* we held that when one invites an undercover agent and an informant into his residence, the agent or informant can summon back-up officers for assistance, and that these back-up officers are acting within their constitutional limits when they enter since no further invasion of privacy is involved once the undercover officer and informant make the initial consensual entry. Today, we extend that concept to cases in which a confidential

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[2] Tennessee is one of those states that has granted the arrest power to its citizens. Tenn. Code Ann. § 40-7-109(a)(3) (2004) ("A private person may arrest another . . . [w]hen a felony has been committed, and the arresting person has reasonable cause to believe that the person arrested committed it."). Thus, Kim could have made the arrest himself had he chosen to do so. Instead, he called officers to assist him, a permissable choice. *Pollard,* 215 F.3d at 648.

informant enters a residence alone, observes contraband in plain view, and immediately summons government agents to effectuate the arrest.

B. Two-Point Enhancement for Obstruction of Justice

The district court assessed a two-point enhancement based upon § 3C1.1 of the Sentencing Guidelines, obstructing or impeding the administration of justice. In the Addendum to Yoon's Plea Petition, Yoon acknowledged that 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. (Addendum to the Plea Petition at ¶9). By signing the Addendum to the Plea Petition, Yoon waived his "right to appeal any sentence within the maximum provided in the offense level as determined by the court or the manner in which that sentence was determined on the grounds set forth in 18 U.S.C. § 3742 . . . " (Addendum to the Plea Petition at ¶9). There is no reason that Yoon's knowledgeable and voluntary waiver of his right to appeal should not be enforced.[3]

The defendant further alleges that the district court's assessment of a two-point sentencing enhancement for obstruction of justice was clearly erroneous in the light of *Blakely v. Washington,* 542 U.S. ___ (2004). This argument likewise fails for the defendant has clearly waived his right to appeal his sentence.

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[3] In any event, the defendant's actions in "outing" a government witness/co-defendant via the internet would be just the type of conduct warranting the obstruction of justice enhancement. USSG § 3C1.1, comment. (n.4(a)).

Accordingly, the sentence of the district court is affirmed.

IV. CONCLUSION

Because we conclude that the warrantless entry into Defendant Yoon's apartment did not violate the Fourth Amendment based on the doctrine of "consent once removed", and because Yoon waived the right to appeal his sentence by signing the Addendum to his Plea Petition, the judgment and sentence of the district court are hereby **AFFIRMED**.

CONCURRENCE

KENNEDY, Circuit Judge, concurring. I concur in Judge Hood's opinion but write separately to explain why the "consent once removed doctrine" adopted by our Court in *United States v. Pollard,* 215 F.3d 643 (6th Cir. 2000), to apply to undercover police officers (and in dicta to informants) is equally applicable to informants in light of the doctrine's conceptual foundation.

The Fourth Amendment, the Supreme Court declared, draws a firm line at the entry to one's house such that a police officer may not, in the absence of exigent circumstances or consent, enter a house to arrest or search without first obtaining a warrant. *See Payton v. New York,* 455 U.S. 573, 585-589 (1980) (holding that since the physical entry of the home is the chief evil against which

the wording of the Fourth Amendment is directed, absent exigent circumstances or consent, officers may not enter a home without a warrant). Neither the exigent circumstances nor the traditional consent exception to the warrant requirement supports the application of the "consent once removed" doctrine. This doctrine appears to have arisen out of cases where the government was unable to rely upon exigent circumstances to justify the warrantless entry into a suspect's home by officers who entered the suspect's home after the government informant or undercover agent had established probable cause to arrest the suspect. *United States v. Paul*, 808 F.2d 645, 647 (7th Cir. 1986) (noting that the officers entry into the suspects home was not "within the emergency exception" to *Payton*); *United States v. Akinsanya*, 53 F.3d 852, 856 & n.1 (7th Cir. 1995) (noting that "[t]he government wisely chose not to pursue its exigent circumstances argument . . . [since] [e]xigent circumstances did not exist" in this case).[1]

Recognizing that exigent circumstances did not support the warrantless entry of police officers into a suspect's home after the agent or informant inside the home established probable cause to arrest the suspect, the courts instead relied upon the other exception to the warrant requirement, consent. *See Paul*, 808 F.2d at 647-48 ("Although we do not think the search was within the emergency exception to *Payton*, there is an alternative ground on which its lawfulness must be sustained: consent").

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[1] In fact, in *Pollard*, Judge Nathaniel Jones dissented from this Court's adoption of the "consent once removed" doctrine on the ground that it constituted an "unjustified extension of our traditional exigent circumstances jurisprudence." 215 F.3d 643, 649 (6th Cir. 2000).

Although it is certainly true that an undercover agent or a government informant receives consent when he is invited into a suspect's home, it is a fiction to claim that the subsequent officers who enter the suspect's home also receive the suspect's consent to enter. One court, however, appears to have espoused such a reliance upon consent, as it noted: When a suspect gives his consent to a government informant to enter his house, the suspect effectively gives consent to the agents with whom the government informant is working. *Akinsanya,* 53 F.3d at 856. Since the suspect controls who may enter his home absent a warrant or exigent circumstances, it cannot be claimed that a suspect, because he consented to the entry into his home by a government informant, also consents to the forced or surreptitious entry of the officers with whom the informant is working, since, in fact, no consent has been given to them. Moreover, simply because the government informant received consent to enter the suspect's home does not mean that the government informant himself thereby has authority to consent to the entry of the agents with whom he is working.

The doctrine, therefore, is not based upon either the exigent circumstances or the traditional consent exception to the warrant requirement.[2] Rather, it is based upon the

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[2] Although the doctrine is not based upon either the exigent circumstances or the traditional consent exception, one could characterize the conceptual foundation of the doctrine as based upon a combination of a sort of "quasi exigent circumstances and consent." For instance, in *Bramble,* the court concluded that the warrantless entry of the additional officers into the suspect's home did not violate the Fourth Amendment since the suspect had a diminished expectation of privacy as he had already invited an undercover agent into his home (consent), and, in any event, the court continued, "any remaining expectation of

(Continued on following page)

theory that, because an undercover agent or informant who establishes probable cause to arrest the suspect may in fact arrest him then and there, he should be entitled to call in the agents with whom he is working to assist in the arrest[3] because, once the suspect invites the agent or informant into his house and displays his illegal activity to him, the suspect's Fourth Amendment expectation of privacy has been "fatally compromised." *Paul,* 808 F.2d at 648 ("The interest that the *Payton* decision protects is the interest in the privacy of the home, and [that interest] has been fatally compromised when the owner admits a confidential informant and proudly displays contraband to him. It makes no difference that the owner does not know he is dealing with an informant"). *See United States v. Bramble,* 103 F.3d 1475, 1478 (9th Cir. 1996) ("Once consent has been obtained from one with authority to give it, any expectation of privacy has been lost. We seriously doubt that the entry of additional officers would further diminish the consenter's expectation of privacy . . . "); *United States v. Janik,* 723 F.2d 537, 548 (7th Cir. 1983) (concluding that since the suspect had already invited an officer into his home, the warrantless entry of additional officers into the suspect's home constituted a trivial invasion of the suspect's privacy).

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privacy was outweighed by the legitimate concern for the safety of the officers inside" (exigent circumstances). 103 F.3d at 1478.

[3] Although police officers cannot create exigent circumstances to justify their entry into a suspects home, *see Williams,* 354 F.3d 497, 504 (6th Cir. 2003), if an undercover agent or informant in a suspect's home were to find herself to be in danger due to circumstances that she neither created nor which she could have readily averted, then the subsequent entry of officers to aid her would be supported by exigent circumstances.

Thus, the doctrine is not made conceptually possible by law enforcement powers, as the dissent contends, such as the ability to seize incriminating evidence in plain view or the theory of collective knowledge.[4] Rather, the back-up officers entry into the suspect's home does not offend the Constitution because the suspect's expectation of privacy has been previously compromised. The only power that is traditionally viewed as a police power that is potentially necessary to support this doctrine is the arrest power, since, as the doctrine goes, once the invitee establishes probable cause to arrest, he may call for additional officers to *assist* him in effectuating the arrest. *See Pollard,* 215 F.3d at 648 (noting that once the undercover agent established probable cause to arrest the suspects, he could have arrested them if he had chosen to do so, but was entitled to rely upon back-up officers to assist him); *Paul,* 808 F.2d at 648 (noting that when one invites an undercover agent into his house, the agent can summon other agents to assist in the arrest). The arrest power, however, does not lie in the sole province of the police, but rather it has been granted to the citizens of many states. *See* 5 Am.Jur.2d *Arrest* § 56; 133 A.L.R. 608. As is relevant in this case, Tennessee is one of those states that has granted the arrest power to its citizens.[5] Tenn. Code. Ann. § 40-7-109(a)(3)

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[4] The ability of officers to seize evidence in plain view does not justify the entry of back-up officers into the suspect's home. Neither does the theory of collective knowledge justify it. The fact that we can impute the knowledge of the officer inside the suspect's home to the back-up officers does not entitle the back-up officers to enter. If these powers were the pillars upon which the doctrine rested, then *Pollard* would have been decided incorrectly.

[5] The dissents chastisement that we are "deputizing the lawless" evidences a misunderstanding as to the basis of the doctrine. Since the doctrine is not based on police powers, as explained in footnote 4, *supra,*

(Continued on following page)

(2004) ("A private person may arrest another . . . [w]hen a felony has been committed, and the arresting person has reasonable cause to believe that the person arrested committed it"). Since a citizen, just as an officer, may receive a suspect's consent to enter his home, determine if probable cause exists to arrest the suspect, and arrest him, then a citizen should be entitled to summon assistance in order to effectuate the arrest because the suspect's expectation of privacy is just as fatally compromised when he invites an informant into his house and displays his illegal activity to him as it is when he invites a government agent. *Paul,* 808 F.2d at 648 (noting that an owner's interest in the privacy of his home is fatally compromised when he "admits a confidential informant and proudly displays contraband to him" and that "[i]t makes no difference that the owner does not know he is dealing with an informant").

Having adopted the "consent-once-removed" doctrine with respect to an undercover agent calling upon police back-up to effect an arrest based upon probable cause disclosed to him in his undercover capacity, there is no justifiable distinction between the undercover officer's and an informant's ability to call upon the police to aid in the arrest. The consent in each instance is given without knowledge of the undercover status of the visitor.

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no police powers are "entrusted" to the informants. If any police power were necessary to support this doctrine, it would be the arrest power, a power which has been granted to the citizens of Tennessee, including to those without a spotless past.

DISSENT

RONALD LEE GILMAN, Circuit Judge, dissenting. I agree with the majority that the language in *United States v. Pollard*, 215 F.3d 643, 648 (6th Cir. 2000), that applies the doctrine of consent once removed to an informant is dicta. In addition, I believe that the majority has properly recognized the Supreme Court's admonition that "[t]he Court has often heard, and steadfastly rejected, the invitation to carve out further exceptions to the warrant requirement for searches of the home." *Illinois v. Rodriguez*, 497 U.S. 177, 192 (1990). But the majority then proceeds to disregard this admonition in the case before us, compelling me to dissent. For the reasons set forth below, I would **REVERSE** the judgment of the district court, **VACATE** Yoon's sentence, and **REMAND** the case for further proceedings.

I. ANALYSIS

A. Extension of the consent-once-removed doctrine to informants

As noted by the majority, the Seventh Circuit has extended the doctrine of consent once removed to civilian informants. *See United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986) (holding that the doctrine of consent once removed "extends to the case where the initial, consensual entry is by a confidential informant"); *see also United States v. Diaz*, 814 F.2d 454, 459 (7th Cir. 1987) (noting that the doctrine applies "only where the agent (or informant) [who] entered at the express invitation of someone

with authority to consent . . . established the existence of probable cause to effectuate an arrest or search, and immediately summoned help from other officers"). Subsequent Seventh Circuit cases have followed *Paul* and *Diaz*. *See United States v. Akinsanya,* 53 F.3d 852, 856 (7th Cir. 1995) (upholding the constitutionality of a warrantless search conducted by the police after an informant had been given consent to enter); *United States v. Jachimko,* 19 F.3d 296, 299 (7th Cir. 1994) (holding that the district court erred in failing to apply the rule announced in *Paul* and *Diaz* to a warrantless search based upon a signal from an informant granted access to the residence).

Several other courts, both federal and state, have adopted the doctrine of consent once removed, but almost all of these cases, like our own case of *Pollard,* have actually applied the doctrine only to police officers rather than to informants. *See, e.g., United States v. Bramble,* 103 F.3d 1475, 1478-79 (9th Cir. 1996) (adopting the doctrine of consent once removed to determine the constitutionality of a search based on consent given to an undercover police officer); *State v. Henry,* 627 A.2d 125, 130-131 (N.J. 1993) (upholding the constitutionality of an arrest effected after an undercover police officer gained consent to enter and then briefly exited the apartment to summon backup help). Although most of these cases contain dicta similar to that in *Pollard,* I have found only one outside of the Seventh Circuit that has applied the concept to an informant. *See Baith v. State,* 598 A.2d 762, 766-68 (Md. 1991) (upholding the constitutionality of a search based on consent given to an informant, but not explicitly discussing the doctrine of consent once removed). Because I find the reasoning of such cases unpersuasive and contrary to Supreme Court jurisprudence regarding warrantless

searches and seizures, I would have the Sixth Circuit reject this extension of the consent-once-removed doctrine.

B. The majority's severance of probable cause from the warrant requirement is unjustified

As stated by the majority, the informant's signal to the police "established the necessary probable cause to effectuate an arrest." Maj. Op. at 5. The opinion fails to note, however, that, in the absence of exigent circumstances, the existence of probable cause simply *entitles the police to obtain a warrant* to enter a home, not to charge inside without a warrant. *See Illinois v. Rodriguez*, 497 U.S. 177, 181 (1980) ("The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects."). Indeed, if this were not the law, there would be no need for the warrant requirement at all – police officers could simply invade homes whenever they deemed that probable cause existed, without the intervention of a neutral magistrate. Such a severance of probable cause from the warrant requirement is completely unjustified.

C. Expanding the doctrine of consent once removed to informants ignores the conceptual basis of the doctrine and improperly gives police powers to suspect informants

The doctrine of consent once removed is made conceptually possible by law-enforcement powers that have been granted to the police, but never to civilians. These powers consist of (1) the ability of police officers to lawfully seize incriminating evidence in plain view, and (2) the theory of collective knowledge, under which the knowledge of one

law enforcement officer can be imputed to another if the other is working on the same investigation. The Supreme Court's enunciation of the "plain-view doctrine" explicitly assumes that the evidence is in the plain view of police officers. *See Horton v. California,* 496 U.S. 128, 136-37 (1990) ("It is . . . an essential predicate to any valid warrantless seizure of incriminating evidence that *the officer* did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.") (emphasis added).

Likewise, courts have imputed collective knowledge about criminal investigations to law enforcement officials, not to the general public. *See Collins v. Nagle,* 892 F.2d 489, 495 (6th Cir. 1989) (noting that "[m]any circuits, including our own, have determined that probable cause may be established from the collective knowledge *of the police* rather than solely from the *officer* who actually made the arrest") (emphasis added); *see also United States v. Woods,* 544 F.2d 242, 260 (6th Cir. 1976) (describing the collective knowledge theory as imputing mutual knowledge to "a group of agents in close communication with one another [who] determine[] that it is proper to arrest an individual. . . . ").

Indeed, this circuit has made an explicit distinction between imputing the knowledge of law enforcement officials to each other and imputing the knowledge of an informant to law enforcement officials: "The danger of [a law enforcement official's] having falsified his information is simply not as great as with an unnamed criminal informer who may be seeking favorable treatment from the government or revenge against the suspect." *United States v. Calandrella,* 605 F.2d 236, 246 (6th Cir. 1979)

(imputing knowledge of an SEC official about suspicious securities transactions to other law enforcement officials).

I have no problem with the proposition that a suspect who voluntarily consents to the entry of a law enforcement officer waives the right to insist on a search warrant. Nor do I question the wisdom of the consent-once-removed doctrine that imputes collective knowledge among law enforcement officers. What gives me grave concern is the extension of the doctrine to lay informants, because the extension entrusts to ordinary civilians law-enforcement powers previously given only to the police.

Furthermore, these powers are entrusted to a suspect class of civilians – informants who themselves often have criminal charges pending and therefore have every reason to curry favor with the police in the hope of receiving lenient treatment for their own wrongdoing. Thus, by not recognizing the conceptual basis for the consent-once-removed doctrine, the majority effectively deputizes the very criminals from whom law enforcement officials should be protecting law-abiding citizens.

D. As Yoon's case illustrates, an expansion of the consent-once-removed doctrine is unnecessary

The Supreme Court has vigorously affirmed the importance of the warrant requirement and has long since warned against attempts to undercut it. In addition to *Illinois v. Rodriguez*, 497 U.S. 177, 192 (1990), see *Johnson v. United States*, 333 U.S. 10, 15 (1948), in which the Court held that "the inconvenience to the officers and . . . slight delay necessary to prepare papers and present the evidence to a magistrate" is not a sufficient reason to abrogate the warrant requirement. As the facts of Yoon's

case well illustrate, the majority's invitation for the police to avoid the inconvenience of the warrant requirement by having informants obtain consent to enter homes is entirely unnecessary.

Here, for example, there was no justifiable reason for the police not to seek a warrant before entering Yoon's apartment. "[T]here can be no claim that immediate police action was needed to prevent the destruction of vital evidence or thwart the escape of known criminals." *United States v. Morgan,* 743 F.2d 1158, 1163 (6th Cir. 1984) (holding that the warrantless entry and search of the defendant's home was illegal because, "[a]bsent exigent circumstances, police officers may not enter an individual's home or lodging to effect a warrantless arrest or search"); *see also United States v. Killebrew,* 560 F.2d 729, 734 (6th Cir. 1977) (holding that a warrantless entry could not be justified on the ground that the suspect might escape, where he "was not known to be dangerous and no grave offense or crime of violence was threatened or indicated").

The only exigent circumstances in this case were created by the police themselves. According to the testimony of TBI Officer Margie Williams, the police did not give Kim enough money to complete the drug deal, and concern for Kim's safety was one reason for the raid. But, as noted in *Morgan,* "[p]olice officials . . . are not free to create exigent circumstances to justify their warrantless intrusions." 743 F.2d at 1163. What the police gained from this entry – and what the majority holds to be of greater importance than the warrant requirement – was thus nothing more than the avoidance of "the inconvenience to the officers," *Johnson,* 333 U.S. at 15, in obtaining a warrant.

E. Citizens' power of arrest

The majority also points out that a Tennessee citizen can legally arrest another whom he or she has reasonable cause to believe has committed a felony. *See* T.C.A. § 40-7-109(a) (2004) ("A private person may arrest another . . . [w]hen a felony has been committed, and the arresting person has reasonable cause to believe that the person arrested committed it."). From this premise, however, the majority makes the unwarranted assertion that a private citizen who witnesses a felony in a person's home can give the police permission to burst into the home without a warrant in order to assist in the arrest. Maj. Op. at 7, n.2. No authority is cited in support of this novel proposition other than this court's dicta in *Pollard*. *Id.*

The majority's assertion ignores the difference between the restrictions that the Fourth Amendment places on state actors, such as police officers, and the restrictions it places on private citizens. Even if a private citizen in Kim's position could enter Yoon's home and arrest him, the consent given to that private citizen would not permit the police to engage in a warrantless arrest inside the home absent exigent circumstances or consent specifically given to a police officer. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971) (holding that "a search or *seizure* carried out on a suspect's premises without a warrant is per se unreasonable, unless the *police* can show that it falls within one of a carefully defined set of exceptions based on the presence of exigent circumstances") (emphasis added).

F. Sentencing issues

Because I would reverse Yoon's conviction, I would also vacate his sentence. *See United States v. Jenkins*, 345 F.3d 928 (6th Cir. 2003) ("Because we reverse [the defendant's] conviction, we need not address her argument that the district court erred in denying her a two-level reduction . . . or her argument that the district court erred in failing to sentence her pursuant to [the Guidelines'] safety-valve provisions.") Yoon's argument that his sentence is unconstitutional under *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531, 2536-37 (2004), is similarly moot in my view.

II. CONCLUSION

In sum, I believe that the majority's decision to expand the doctrine of consent once removed to informants seriously chips away at the Fourth Amendment's prohibition against warrantless searches and seizures. By severing probable cause from the warrant requirement and deputizing the lawless, the majority invites police officers to evade the warrant requirement for reasons no more pressing than mere convenience. This is directly contrary to the Supreme Court's admonition in *Coolidge* that a seizure carried out on a suspect's premises without a warrant is per se unreasonable in the absence of exigent circumstances. I therefore respectfully dissent.

APPENDIX B
ORDER ON MOTION FOR REHEARING

Case No: 03-5875

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

(Filed May 12, 2005)

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

MIN YOON

Defendant-Appellant

BEFORE: KENNEDY and GILMAN, Circuit Judges: HOOD, District Judge.*

Upon consideration of the petition for rehearing filed by the Appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green ds
Leonard Green, Clerk

* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

(2)

No. 05-126

FILED
SEP 28 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

MIN YOON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a warrantless entry of law enforcement officers into an apartment to arrest petitioner violated the Fourth Amendment where the officers were summoned by a cooperating informant who had been invited into the apartment for a drug transaction and who observed contraband once inside the apartment.

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In the Supreme Court of the United States

No. 05-126

MIN YOON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 398 F.3d 802.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 2005. A petition for rehearing was denied on May 12, 2005 (Pet. App. 26). The petition for a writ of certiorari was filed on July 20, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of Tennessee, petitioner was convicted on one count of conspiring to distribute and possess with intent to distribute 50 kilograms or more of marijuana, in violation of 21 U.S.C.

846, and one count of possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioner to 97 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-25.

1. In June 2002, Meen Kim was arrested while delivering ten pounds of marijuana to a cooperating informant. Following his arrest, Kim agreed to cooperate with the continuing investigation of the Tennessee Bureau of Investigation (TBI). Pet. App. 3; Gov't C.A. Br. 4.

As part of his cooperation, Kim made a series of phone calls to petitioner and arranged to purchase 20 pounds of marijuana from him. Petitioner refused to consign the marijuana to Kim, insisting instead on receiving cash at the time of delivery. Kim informed TBI that he had previously picked up drugs from petitioner at an apartment at 2010 Brentridge Circle. Anticipating that the arranged transaction might occur at the same location, TBI established surveillance on the apartment. Pet. App. 3; Gov't C.A. Br. 4.

Petitioner later called Kim and directed Kim to come over to the apartment to conclude the transaction. TBI did not have sufficient funds to cover the entire cost of the purchase, and it instead gave Kim the $3500 that it had on hand. TBI also provided Kim with an audio transmitter and instructed him to inform the investigators once he saw marijuana inside the apartment. A TBI agent testified that the circumstances, including the lack of sufficient funds to complete the transaction, caused him to be concerned for Kim's safety. Pet. App. 3; Gov't C.A. Br. 5-6.

Kim knocked on the door to the apartment, exchanged greetings with petitioner, and was admitted

into the apartment by petitioner. Once inside, Kim observed the marijuana and notified the officers of his observation by asking petitioner, "[h]ey, are you having to break it down?" Petitioner responded affirmatively. Kim then asked, "[w]ell, is that all there is," to which petitioner responded, "[n]o, no, there's more." Pet. App. 3; Gov't C.A. Br. 6; 10/18/02 Suppression Tr. 35.

Upon hearing that exchange, law enforcement officers entered the apartment and arrested petitioner as he was trying to escape out the window. During a protective sweep of the apartment, officers found approximately 80 pounds of marijuana in plain view. After advising petitioner of his *Miranda* rights, the officers asked him if would consent to a search of the apartment. Petitioner responded, "Go ahead, you're already here." Pet. App. 3.

2. Following his indictment, petitioner moved to suppress the evidence found in the apartment. After receiving testimony and argument, the district court issued an oral ruling denying the motion. In relevant part, the court ruled that the officers' entry into the apartment was authorized by the "consent-once-removed" doctrine recognized in *United States* v. *Pollard*, 215 F.3d 643 (6th Cir.), cert. denied, 531 U.S. 999 (2000). The court also held that the protective sweep was justified and that the marijuana was found in plain view. Pet. App. 4; 10/18/02 Suppression Tr. 181-183. Petitioner subsequently entered a conditional guilty plea, reserving "the right to appeal the determination of the appropriateness of the entry and search of 2010 Brentridge Circle." Pet. App. 4.

3. A divided panel of the Sixth Circuit affirmed. Pet. App. 1-25.[1]

a. The court began by explaining that it had previously held that "the police can enter a suspect's premises to arrest the suspect without a warrant if '[an] undercover agent or informant: 1) entered at the express invitation of someone with authority to consent; 2) at that point established the existence of probable cause to effectuate an arrest or search; and 3) immediately summoned help from other officers.'" Pet. App. 6-7 (quoting *Pollard*, 215 F.3d at 648). The subsequent entry of the other officers, the court explained, is valid because "no further invasion of privacy is involved once the undercover officer and informant make the initial consensual entry." Pet. App. 10.

Although the present case is similar to *Pollard*, the court noted that it differed from *Pollard* in one respect. In *Pollard*, an informant and an undercover officer had been invited into the premises. In the present case, only the informant had been invited in. It was thus necessary for the court to decide whether the doctrine of "consent once removed" recognized in *Pollard* also applied where an undercover officer did not accompany the informant into the premises. Pet. App. 7-9. The court held that the doctrine applied in that situation, relying in large

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[1] Petitioner also challenged a sentencing enhancement he had received for obstructing justice based on his having posted an anonymous webpage displaying a photograph of Kim, identifying Kim as an "FBI Informant," and threatening Kim with both an image of a pistol firing at Kim's head and text expressing the hope that Kim "would 'get . . . [his] ass beat daily.'" Pet. App. 4. The court of appeals rejected petitioner's sentencing challenge because he had waived his right to appeal his sentence in his plea agreement. *Id.* 4-5, 11. Petitioner does not renew his sentencing challenge in this Court.

part on similar cases from the Seventh Circuit. See *id.* at 10-11 ("Today, we extend [*Pollard*] to cases in which a confidential informant enters a residence alone, observes contraband in plain view, and immediately summons government agents to effectuate the arrest."); *id.* at 9-10 (discussing the decisions of the Seventh Circuit and adopting the reasoning in those cases).

Considering the specific facts of this case, the court of appeals explained that Kim had been invited into the apartment, had observed the marijuana after he was inside, and had immediately notified the awaiting officers. The court therefore concluded that "all three criteria of the 'consent once removed' doctrine were established in the present case." Pet. App. 10.

b. Judge Kennedy filed a concurring opinion to amplify the reasons that the doctrine of "consent once removed" applies where the initial entry is by an informant. Pet. App. 12-17. Judge Kennedy explained that the doctrine is grounded in the recognition that, "once the suspect invites the agent or informant into his house and displays his illegal activity to him," the "back-up officers['] entry into the suspect's home does not offend the Constitution because the suspect's expectation of privacy has been previously compromised." *Id.* at 15-16. With respect to the ensuing arrest, Judge Kennedy reasoned that, "once the invitee establishes probable cause to arrest, he may call for additional officers to *assist* him in effectuating the arrest." *Id.* at 16. Because the arrest power under the law of many States (including Tennessee) extends beyond law enforcement officers to encompass citizens, Judge Kennedy perceived "no justifiable distinction between [an] undercover officer's and an informant's ability to call upon the police to aid in the arrest." *Id.* at 17.

c. Judge Gilman dissented. Pet. App. 18-25. In his view, the "doctrine of consent once removed is made conceptually possible by law-enforcement powers that have been granted to the police, but never to civilians," namely, the power to seize evidence in plain view and the theory that the knowledge of one law enforcement officer can be imputed to another officer involved in the same investigation. *Id.* at 20-21. He therefore believed that applying the doctrine in this case impermissibly entrusted informants with powers previously limited to the police. *Id.* at 22.

ARGUMENT

Petitioner contends (Pet. 3-16) that the court of appeals erred in extending the doctrine of consent once removed to a situation in which a cooperating informant (rather than an undercover officer) is invited into a residence, observes contraband and a felony occurring within the residence, and immediately signals the police monitoring him to arrest the suspect. That contention does not merit this Court's review.

1. As petitioner effectively acknowledges (Pet. 4-7), there is no conflict among the courts of appeals concerning the validity of the doctrine of consent once removed. To the contrary, the three courts of appeals to have addressed the issue have adopted the doctrine. See *United States* v. *Pollard*, 215 F.3d 643, 648-649 (6th Cir.), cert. denied, 531 U.S. 999 (2000); *United States* v. *Bramble*, 103 F.3d 1475, 1478-1479 (9th Cir. 1996); *United States* v. *Diaz*, 814 F.2d 454, 459 (7th Cir.), cert. denied, 484 U.S. 857 (1987). See also *State* v. *Johnston*, 518 N.W.2d 759, 762-766 (Wis.), cert. denied, 513 U.S. 1021 (1994); *State* v. *Henry*, 627 A.2d 125, 130-131 (N.J.), cert. denied, 510 U.S. 984 (1993).

Few decisions address the applicability of the doctrine to the circumstances of this case, where the initial consensual entry is by a cooperating informant rather than an undercover officer. Nevertheless, the Sixth and Seventh Circuits, the only two courts of appeals to have addressed the issue, agree that the doctrine applies where a cooperating informant acting on behalf of the government is invited into the residence. See Pet. App. 6-11; *United States* v. *Paul*, 808 F.2d 645 (7th Cir. 1986).

2. There is no merit to petitioner's contention (Pet. 7-16) that the decision below is inconsistent with this Court's decisions. Although the Fourth Amendment generally requires that police officers have a warrant before entering a suspect's residence to make an arrest, this Court has long recognized an exception to the warrant requirement where the suspect consents to an agent's entry into the home. See, *e.g.*, *Payton* v. *New York*, 445 U.S. 573 (1980); *Lewis* v. *United States*, 385 U.S. 206 (1966); *Pollard*, 215 F.3d at 648. Here, there is no dispute that petitioner consented to Kim's entry into the apartment. There thus is also no dispute that Kim, although an agent of the government, was authorized under the Fourth Amendment to enter the apartment, to have the government monitor and record his conversation with petitioner, and to observe anything in plain view within those areas encompassed by petitioner's consent. See, *e.g.*, *Hoffa* v. *United States*, 385 U.S. 293 (1966); *Paul*, 808 F.2d at 648; *United States* v. *Janik*, 723 F.2d 537, 548 (7th Cir. 1983).

The consent-once-removed doctrine is grounded in the implications of that initial consensual entry for petitioner's privacy interests in his apartment. As the court explained in *Paul*, "[t]he interest that the *Payton* decision protects is the interest in the privacy of the home,"